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BEFORE THE ARIZONA CORPORATION COMMISSION

09

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MARC SPITZER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

AZ CORP COMMISSION
DOCUMENT CONTROL

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IN THE MATTER OF THE FORMAL) DOCKET NO. T-03693A-05-0875
COMPLAINT AND REQUEST FOR) T-01051B-05-0875
DECLARATORY JUDGMENT OF PAC-WEST)
TELECOMM) **FIRST AMENDED COMPLAINT**
) **FOR DECLARATORY**
) **JUDGMENT**
)

Pursuant to A.A.C. R14-3-106(L), Pac-West Telecomm, Inc. ("Pac-West"), brings the following First Amended Complaint against Qwest Corporation ("Qwest") and alleges as follows:

PARTIES

1. Plaintiff. Pac-West is a public service corporation that is certified to provide competitive telecommunications services, including switched and non-switched local exchange and long distance service in Arizona. Docket No. T-03693A-99-0032 (Decision No. 61903). Pac-West provides service to customers in Arizona. The Pac-West corporate headquarters is located at 1776 West March Lane, Suite 250, Stockton, California 95207.

2. Defendant. Qwest is an incumbent local exchange company ("ILEC"), as defined in 47 U.S.C. § 251(h), that provides local exchange and other telecommunications services throughout the State of Arizona.

JURISDICTION

3. Commission Jurisdiction. The Commission has jurisdiction over this Complaint and over Qwest pursuant to 47 U.S.C. §§ 251-52; A.R.S. §§ 40-203, 40-246, 40-249, and 40-329; and A.A.C. R14-3-106.

PROCEDURAL HISTORY AND OVERVIEW

4. On December 6, 2005, Pac-West commenced this action, under this case number, to prevent Qwest from unilaterally disconnecting services to Pac-West or its customers. In that complaint, Pac-West also sought a declaratory ruling that Qwest was obliged to adjust its bills to Pac-West for local interconnection service facilities to reflect Qwest's use of these two-way trunks. Qwest answered the Complaint on January 10, 2006 and filed an Amended Answer alleging new legal theories on March 20, 2006.

5. This First Amended Complaint broadens Pac-West's contractual claim to allege that Qwest is obliged under the contract to pay for facilities on its side of the point of interconnection unless a different compensation arrangement applies pursuant to an interconnection agreement amendment. Qwest remains obligated, as alleged in the original Complaint, to pay for its relative use of facilities ordered pursuant to the InterLCA Amendment.

FACTUAL OVERVIEW

6. Invoicing by Qwest. In December of 2004, the United States District Court for the District of Arizona vacated Commission Decision No. 66385, a decision that had set new rates for transport and switching. *See Qwest Corp. v. Arizona Corp. Comm'n*, No. 03-CV-2462-

PHX-FJM (Ariz. 2004). In February of 2005, acting pursuant to the District Court's order, Qwest sent a letter notifying its wholesale customers that it would send new invoices for amounts owed to Qwest. Pac-West received a spreadsheet from Qwest on March 15, 2005, detailing the amounts Qwest figured it was owed by Pac-West. Pac-West does not dispute the rate Qwest was directed to charge by the district court. However, the invoicing, and subsequent re-invoicing, of those charges caused Pac-West to examine closely the amount Qwest was charging Pac-West for direct trunk transport ("DTT") facilities. As a result of this examination, Pac-West discovered that Qwest was charging Pac-West the full cost of DTT facilities without regard to Qwest's contractual obligation to pay for those facilities. The extent of Qwest's contractual obligation to pay for the facility varies depending upon whether the DTT facilities were ordered pursuant to the terms and pricing in the original contract, or the subsequent InterLCA Amendment, or the SPOP amendment. These amendments are described with particularity below.

7. Correspondence. Pac-West sent a letter to Qwest on May 18, 2005, detailing the improper charges for DTT facilities. Qwest responded by letter on August 16, 2005. Pac-West replied to this letter on September 15, 2005. Qwest replied to Pac-West's letter on October 18, 2005. All of this correspondence is attached at tab 1. Numerous email communications were also exchanged by the parties in an effort to reach agreement on what the Interconnection Agreement required. Throughout this dispute, the parties have worked actively to communicate their respective positions and correct any mistakes of fact or analysis.

8. Facility Charge Dispute. In the simplest terms, this dispute revolves around the appropriate pricing for DTT facilities which are used by Qwest and Pac-West to exchange traffic. The contract between the parties (the interconnection agreement) provides options for

ordering DTT facilities: (1) DTT ordered pursuant to the contract's initial terms; (2) DTT facilities ordered pursuant to the InterLCA amendment; and (3) DTT facilities ordered pursuant to the SPOP amendment. The pricing of the DTT facility is governed by the language of the contract (or amendment) applicable to the DTT product ordered.

LEGAL OVERVIEW

9. Interconnection Agreement ("ICA"). The Interconnection Agreement between Pac-West and Qwest is the result of Pac-West's request, pursuant to 47 U.S.C. § 252(i), to opt into the *Local Interconnection Agreement Between Qwest and AT&T Communications of the Mountain States, Inc.* for interconnection and resale, which the Commission approved by order docketed on July 31, 1997 (ACC Decision No. 60308). The Commission approved the Interconnection Agreement between Qwest and Pac-West on December 14, 1999 in Decision No. 62137. Attachment 4 to the ICA provides as follows:

Pac-West will be responsible for implementing its network on its side of the POI. US West will be responsible for implementing and maintaining its network on its side of the POI. If and when the Parties choose to interconnect at a Meet Point, Pac-West and US West will jointly provision the fiber optic facilities that connect the two networks and shall proportionately share the financial and other responsibilities for that facility based on the reasonably negotiated Meet Point percentage.

Consistent with this paragraph, Qwest is financially responsible for the network on its side of the point of interconnection ("POI"). Qwest has incorrectly billed Pac-Qwest for DTT facilities which lie on Qwest's side of the POI. Section 2.2 of Attachment 4 to the Pac-West/Qwest ICA provides that Pac-West shall "designate at least one POI in the LATA."

10. InterLCA Amendment. Pac-West and Qwest entered into *Amendment No. 1 to the Interconnection Agreement* on September 11, 2000 ("InterLCA Amendment"). The InterLCA Amendment was executed to allow Pac-West to purchase from Qwest local

interconnection service Inter Local Calling Area Facilities ("LIS LCA Facilities"). The InterLCA Amendment was approved by the Commission on February 2, 2001 (Decision No. 63340). The InterLCA Amendment was an alternate option for ordering DTT facilities and does not prevent Pac-West from ordering stand alone DTT facilities from the ICA.

11. Agreed Upon Rate Under the InterLCA Amendment. Section 1.3 of Attachment 1 to the InterLCA Amendment states that "[i]f the distance between the USW Central Office in the local calling area and the distant POI is twenty (20) miles or less, the fixed and per-mile rates for Direct Trunk Transport ("DTT") shall apply in accordance with Appendix A to the Agreement."

12. Relative Use Reduction by Qwest. Section 1.5 of Attachment 1 to the InterLATA LCA provides that "USW will reduce the rate for the first twenty (20) miles of the interLCA facility to reflect the portion of the interLCA facility that is used by USW to transport USW-originated traffic to Pac-West." Read together, sections 1.3 and 1.5 establish a formula for calculating the price for DTT facilities based on Qwest's relative use of those facilities. This reduction applies only to the first 20 miles of facilities ordered by Pac-West pursuant to the InterLCA amendment.

13. SPOP Amendment. On January 12, 2001, Pac-West and Qwest entered into the *Single Point of Presence (SPOP) in the LATA Amendment to the Interconnection Agreement*. Pac-West did not order facilities pursuant to this Amendment until February 2003. Nothing in this Amendment replaced or otherwise modified the parties' financial obligations under the ICA or under the InterLCA Amendment. Pac-West agrees that facilities properly ordered pursuant to the SPOP Amendment are subject to the terms of the SPOP amendment. Pac-West is not

claiming that the RUF described in the InterLCA amendment applies to facilities Pac-West ordered pursuant to the SPOP amendment.

CLAIM FOR RELIEF

Declaratory Judgment Requiring Qwest to Adjust Billing for DTT Facilities

14. The Interconnection Agreement, as amended, is a legal and binding contract between Qwest and Pac-West that was approved by the Commission.

15. As provided in the ICA and InterLCA Amendment to the Interconnection Agreement, Qwest is obligated to pay for DDT facilities ordered pursuant to the ICA which reside on Qwest's side of the POI and to discount the first 20 miles of DTT facilities ordered pursuant to the InterLCA Amendment to reflect Qwest's proportionate use of these two-way trunks. Under the contract, Pac-West cannot be charged for facilities on Qwest's side of the POI, or Qwest's use of these facilities to transport Qwest originated traffic to its POI.

16. Qwest is in breach of the Interconnection Agreement, as amended, in refusing to reduce the charge for these interconnection facilities based on Qwest's use of the facility.

17. The Commission should therefore declare Pac-West entitled to reimbursement for prior DTT facilities overpayments, including interest, and preclude Qwest from bringing any future action demanding payment for amounts attributable to Qwest's use of the LIS facilities on its side of the POI.

PRAYER FOR RELIEF

WHEREFORE, Pac-West prays for the following relief:

A. An order from the Commission requiring that Qwest comply with the Interconnection Agreement, and specifically that Qwest credit Pac-West for the cost of its the LIS facilities on its side of the POI (DTT ordered under ICA), and the cost of its proportionate

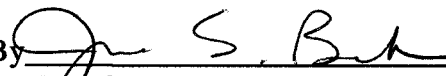
use of facilities less than 20 miles in length (DTT facilities ordered pursuant to InterLCA Amendment). Furthermore, the Order should require the Parties to true-up all prior billing of LIS facilities consistent with Qwest's obligation to pay for DTT facilities as set forth in the ICA, as amended.

B. An order from the Commission requiring Qwest to process Pac-West orders for DTT facilities within the LATA consistent with its contractual obligations under the ICA.

C. Such other or further relief as the Commission finds fair, just and reasonable.

Respectfully submitted this 5th day of May, 2006.

OSBORN MALEDON PA

By 

Joan S. Burke
2929 North Central, Suite 2100
Phoenix, Arizona 85012
(602) 640-9356
E-mail: jburke@omlaw.com

Attorney for Pac-West Telecomm, Inc.

Original and fifteen (15) copies of
the foregoing were filed this 5 day of
May, 2006, with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copies of the foregoing hand-delivered this
5 day of May, 2006, to:

Amy Bjelland
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
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Maureen Scott
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing mailed this
5 day of May, 2006, to:

Norman Curtright
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4041 North Central Avenue
Phoenix, AZ 85012

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May 18, 2005

Norman G. Curtright
Corporate Counsel
Qwest
4041 North Central Avenue, 11th Floor
Phoenix, Arizona 85012

Dear Mr. Curtright:

This letter is in response to the recent invoices Pac-West received from Qwest for Direct Trunk Transport (DTT) charges. Qwest has invoiced Pac-West in the amount of \$283,965.30, on two separate BANs for these DTT facilities ("DTT Invoices"). Pac-West understands that the applicability of the rate used by Qwest is the subject of an appeal by the Arizona Corporation Commission and Mountain Telecommunications, Inc. to the United States Court of Appeals for the Ninth Circuit. Pac-West takes no position here regarding that appeal, or the legality of the rate used by Qwest in calculating the DTT charges. However, as described in more detail below, Pac-West believes Qwest is billing Pac-West for DTT facilities that Qwest is obligated to provide.

Initially Pac-West conducted an internal investigation to confirm that the charges corresponded with the actual facilities leased. During this investigation, Pac-West discovered that Qwest is, and has been, billing Pac-West for DTT facilities less than 20 miles in length. Qwest is not authorized to bill Pac-West for these facilities and, indeed, Qwest is financially responsible for these costs. The Interconnection Agreement ("Agreement") between Qwest and Pac-West requires Qwest to cover the cost of the Local Interconnection facilities on its side of the Point of Interconnection (POI), as well as apply a Relative Use Factor to Qwest's proportionate use of those facilities when calculating the charges. The relevant sections of the Agreement provide as follows:

Amendment 1, section 1.5:

"USW will reduce the rate for the first twenty (20) miles of the interLCA facility to reflect the portion of the interLCA facility that is used by USW to transport USW-originated traffic to Pac-West. USW shall not be required to reduce the Private Line

Norman G. Curtright

Page 2

May 18, 2005

Transport Services rates for the portion of the interLATA LCA facility that exceeds twenty (20) miles in length.”

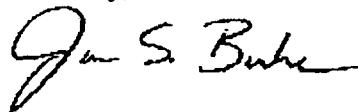
Interconnection Agreement, section 3.1 (in relevant part):

“US West will be responsible for implementing and maintaining its network on its side of the POI.”

Because the majority of the traffic carried on these facilities is originated by Qwest and the facilities are less than 20 miles in length, Qwest must pay the costs associated with these DTT facilities. Pac-West’s payment obligation for its relative use of these facilities (meaning only those costs associated with traffic that is originated by Pac-West) in this case is de minimus. Because Qwest’s obligation to pay has been in place since the Agreement was approved, Qwest also owes Pac-West for amounts mistakenly billed by Qwest, and previously paid by Pac-West.

To expeditiously rectify these billing errors, Pac-West will deduct from the amount billed on the DTT Invoices the amount Pac-West was mistakenly billed by Qwest. While, we are still in the process of calculating the exact figure, initial calculations show that the amount Qwest owes Pac-West exceeds the amount Pac-West owes Qwest. Pac-West will send an invoice providing the exact amount of the overpayment as soon as that figure is calculated. Please feel free to contact me with questions, or to discuss this matter further.

Sincerely,

A handwritten signature in dark ink, appearing to read "Joan S. Burke". The signature is fluid and cursive, with the first name "Joan" being the most prominent part.

Joan S. Burke

JSB/bw

cc: Josh Thieriot, Pac-West Telecom, Inc.

FENNEMORE CRAIG, P.C.

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AUG 17 2005

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August 16, 2005

VIA UNITED STATES MAIL

Joan S. Burke
OSBORN MALEDON
21st Floor
2929 North Central Avenue
Phoenix, Arizona 85012-2794

Re: Pac-West Dispute Regarding DTT Charges

Dear Joan:

Qwest is in receipt of your letter to Norman G. Curtright, dated May 18, 2005, wherein Pac-West disputes Qwest's invoiced amount of \$283,965.30 on two separate BANs for DTT facilities. Except for the adjustment set forth below, Qwest is sustaining the invoiced charges and expects immediate payment by Pac-West.

Qwest has reviewed the contract and amendment language referred to in your letter and the actual billing data used to calculate the amount Qwest invoiced to Pac-West. Qwest offers two products that cross Local Calling Areas - InterLCA and Single Point of Presence (SPOP) - both of which have been ordered by Pac-West at different times. Pac-West ordered InterLCA from Qwest through the March 2003 timeframe. In April of 2003, Pac-West made changes to its network and changed its InterLCA network to SPOP.

Your letter asserts that the InterLCA amendment waives charges for facilities less than 20 miles. Qwest disagrees. The language that Pac-West references (in the Pac-West InterLCA amendment) concerning the 20 miles does not relieve Pac-West from its obligation to pay Qwest if this traffic is 20 miles or less. Rather, it reads as follows:

If the distance between the USW Central Office in the local calling area and the distant POI is greater than twenty (20) miles, the fixed and per-

FENNEMORE CRAIG, P.C.

Joan S. Burke
August 16, 2005
Page 2

mile DTT rates shall apply to the first twenty (20) miles in accordance with Appendix A, and the remaining miles are rated as intrastate monthly fixed and per mile DS1 Private Line Transport Services. The Private Line Transport Services rates are contained in the applicable state Private Line catalogs and Tariffs.

There are two components to the rate, and the provision clearly states that "the fixed and per-mile DTT rates shall apply to the first twenty (20) mile."

However, upon further review of this InterLCA amendment, there is another section that provides for sharing of the 20 miles billed at the Appendix A rate.

USW will reduce the rate for the first twenty (20) miles of the interLCA facility to reflect the portion of the interLCA facility that is used by USW to transport USW-originated traffic to Pac-West. USW shall not be required to reduce the Private Line Transport Services rates for the portion of the interLATA LCA facility that exceeds twenty (20) miles in length.

Qwest has determined that it did not provided Pac-West with this credit for the time period of the dispute and, therefore, Qwest has calculated that it owes Pac-West \$10,632.30 for the portion of traffic Qwest used, which was 100% of the 20 miles billed at Appendix A.

The other section that Pac-West references in your letter is Section 3.1 in the current Interconnection Agreement between Pac-West and Qwest. This section reads as follows:

Pac-West will be responsible for implementing and maintaining its network on its side of the POI. U S WEST will be responsible for implementing and maintaining its network on its side of the POI. If and when the Parties choose to interconnect at a Meet Point, Pac-West and U S WEST will jointly provision the fiber optic facilities that connect the two networks and shall proportionately share the financial and other responsibilities for that facility based on the reasonably negotiated Meet Point percentage.

The provisions of the above language concerning jointly provided facilities and cost sharing apply only if the Parties choose to interconnect at a Meet Point. Pac-West and Qwest do not interconnect at a Meet Point, and Pac-West did not order the facilities at a Meet Point. Therefore Pac-West has the financial responsibility to pay for the facilities it has ordered from Qwest.

Once these facilities were changed from InterLCA to SPOP, the InterLCA amendment no longer pertained to the SPOP facilities, so the 20 miles at Appendix A rates and the 20 miles cost of sharing those facilities rated at the Appendix A rate no longer applied. In fact, the whole

FENNEMORE CRAIG, P.C.

Joan S. Burke
August 16, 2005
Page 3

facility 20 miles and more under SPOP is rated all at Appendix A rates, which means Pac-West's total facility rate was lowered starting in April of 2003. There is no language in either Pac-West's current Interconnection Agreement or the SPOP amendment that would allow for sharing of the facility, and the charge for the entire facility is the responsibility of Pac-West.

In addition to the dispute identified in your letter, Pac-West has started with the May 2005 bill to dispute all charges on its SPOP facilities. Qwest has asked a number of times for Pac-West to explain the reason for this dispute on the current SPOP facilities, but to date Pac-West did not provide the information requested or any substantive explanation that would justify its dispute of the charges at issue. These current charges are appropriate and Pac-West should pay Qwest for the SPOP facilities it has ordered from Qwest.

Qwest expects payment of \$273,333.00 and the current dispute balance to be paid in full immediately or Qwest will turn over this dispute to collections.

Sincerely,

FENNEMORE CRAIG, P.C.



Theresa Dwyer

TD/kb

cc: Norm Curtright

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September 20, 2005

Theresa Dwyer
Fennemore Craig, P.C.
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012-2913

Re: Pac-West Claim for DTT Charges

Dear Theresa:

I have discussed your letter dated August 16, 2005, with my client and submit the following responses to the positions outlined in your letter.

First, we disagree with Qwest's position that the InterLCA amendment does not apply to Single Point of Presence ("SPOP") facilities and for that reason the Relative Use Factor ("RUF") does not apply to SPOP facilities that are less than 20 miles in length. The SPOP Amendment makes no provision for cost sharing and provides that "[e]xcept as modified herein, the provisions of the Agreement shall remain in full force and effect." SPOP Amendment at 1.

The InterLCA Amendment is the section of the ICA that governs the parties' cost-sharing obligation with respect to facilities that are under 20 miles in length. Specifically, it provides that "USW will reduce the rate for the first twenty (20) miles of the interLCA facility to reflect the portion of the interLCA facility that is used by USW to transport USW originated traffic to Pac-West." Nothing in the SPOP Amendment or the InterLCA Amendment states that cost-sharing arrangements for facilities that are less than twenty miles in length will change if interLCA facilities are replaced by SPOP facilities.¹

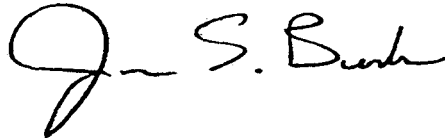
Pac-West fundamentally disagrees that the SPOP amendment relieved Qwest of its obligation under the ICA Amendment to absorb its share of the cost of the local interconnection facilities on its side of the Point of Interconnection (POI).

¹ The SPOP allows the carrier to pay lower rates only for the portion of the facility that exceeds twenty miles.

The second argument submitted by Qwest is also based on a mistaken reading of the ICA Amendment. Qwest submits that the ICA Amendment cost-sharing obligation applies only if the parties choose to connect at a Meet Point. However, that is not what the text of the Amendment says. The Amendment imposes the cost-sharing obligation first, and secondarily discusses what would occur *if and when* the parties interconnect at a Meet Point. Pac-West and Qwest do not interconnect at a Meet Point, rather the two carriers meet, as anticipated by this provision, at the POI and the cost-sharing obligation applies.

In conclusion, we do not believe Qwest has a viable defense to Pac-West's claim for a credit equaling the amount Qwest should have paid for its share of interconnection facilities on Qwest's side of the POI. Additionally, turning this matter over to collections or disconnecting facilities would not be advisable. Pac-West is disputing these charges in the manner detailed in the Commission approved Interconnection Agreement between Pac-West and Qwest. If you are aware of any additional information that would impact the foregoing analysis, please let us know at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Joan S. Burke". The signature is fluid and cursive, with the first name "Joan" written in a large, stylized loop.

Joan S. Burke

JSB/bw

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OCT 19 2005

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October 18, 2005

Joan S. Burke
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RE: Pac-West Claim for DTT Charges

Dear Joan:

I have reviewed your letter, dated September 20, 2005, with Qwest, and respond as follows:

Qwest has two different and distinct product offerings under which CLECs may establish one point of presence in a LATA and order facilities to cross Local Calling Areas ("LCA"). These two products are: (1) InterLCA, and (2) Single Point of Presence (SPOP). To distinguish between these two offerings, Qwest developed a separate standardized ICA amendment for each product. Terms and conditions for each type of amendment are mutually exclusive and not interchangeable.

Although Pac-West executed separate amendments to its ICA with Qwest for both InterLCA (approved by the Commission on February 2, 2001) and an SPOP (approved by the Commission on June 6, 2001), Pac-West converted all of its facilities to SPOP in April 2003. Since that time, Pac-West has purchased the services at issue solely out of the SPOP amendment using only SPOP facilities. As a result, the pricing of the InterLCA amendment is simply not applicable.

Pac-West is incorrect when it states that "The SPOP allows the carrier to pay lower rates only for the portion of the facility that exceeds twenty miles." The SPOP amendment, in fact, mandates that Qwest bill the entire facility at the lower rate.

Qwest also does not agree that its InterLCA amendment imposes a Relative Use Factor ("RUF") on all interconnection services. InterLCA is a product offering for CLECs to cross

FENNEMORE CRAIG, P.C.

Joan S. Burke.

October 18, 2005

Page 2

LCAs using a private line. As part of this product, Qwest allowed for line-sharing of the first 20 miles of InterLCA facilities to reflect that portion of those facilities used by Qwest to transport Qwest originating traffic to Pac-West. This is not a RUF amendment, which is an agreement to share facilities initially set at a 50/50 division, and later revised to reflect actual/relative usage.

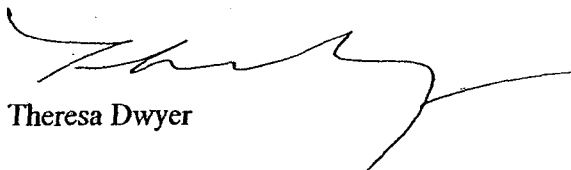
Pac-West does not have any RUF language anywhere in its ICA with Qwest, including both its ICA and SPOP amendments. Neither amendment contains language that requires a reduction of facility charges to reflect actual/relative use. Pac-West has not taken steps to amend its ICA to include RUF language despite that amendment having been made available to it.

There is no basis for the claim that Qwest owes Pac-West more credit for sharing of transport ("Relative Use"). Qwest expects full payment of the amounts due and currently in dispute by Pac-West.

It also appears that Pac-West is withholding payment for amounts billed by Qwest under a rate that is the subject of the appeal by the Arizona Corporation Commission to the Ninth Circuit, notwithstanding your letter of May 18, 2005. There is no basis for nonpayment of the amounts billed by Qwest subsequent to judgment of the district court, issued on December 17, 2004, vacating a portion of the Commission's Decision No. 66385. If Pac-West fails to pay the amounts due under its contract, Qwest will take further action authorized by that agreement. If Pac-West fails to pay in full the arrearage by October 25, 2005, Qwest will continue in its collection activities as previously notified in writing on September 15, 2005.

Sincerely,

FENNEMORE CRAIG, P.C.



Theresa Dwyer

TD/kb

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